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No. 05-1631

IN THE

Supreme Court of the United States

TIMOTHY SCOTT,

Petitioner,

v.

VICTOR HARRIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers as *amicus curiae* in support of respondent.[1]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including the protection of Fourth Amendment liberties. NACDL has frequently filed *amicus curiae* briefs in this Court in cases implicating its substantial interest in safeguarding the individual liberties guaranteed by the Fourth Amendment. *See, e.g.*, *Brigham City v. Stuart*, 126 S. Ct. 1943 (2006); *Kyllo v. United States*, 533 U.S. 27 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Bond v. United States*, 529 U.S. 334 (2000).

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel contributed monetarily to the brief.

NACDL is filing in this case to respond in particular to the brief filed by the Solicitor General. For the reasons explained below, NACDL submits that the Solicitor General's brief misapprehends applicable precedents and misstates the facts of this case.

STATEMENT

This case concerns the decision of a sheriff's deputy to apprehend a teenager fleeing a traffic stop for speeding by engaging in a high-speed chase and slamming his car into the back of the teenager's car while the two were traveling at between 70 and 90 miles per hour, causing the teenager's car to flip and rendering him a quadriplegic. The entire chase covered about nine miles and lasted six minutes in total. Pet. App. 2a. Viewed in the light most favorable to Harris, as must be the case on summary judgment, the operative facts are as follows:

1. On March 29, 2001, at 10:42 in the evening, sheriff's deputy Clinton Reynolds observed respondent Victor Harris, then a teenager, speeding on a state highway in Coweta County, Georgia. Pet. App. 2a, 31a; *see also* R.45, Ex. A. Harris was driving at a speed of 73 miles per hour in a 55-mile-per-hour zone, in a car that was registered in his own name and correct address. Pet. App. 2a. Deputy Reynolds flashed his blue lights, but Harris did not slow down or stop. *Id.* Harris did not stop "because he was scared, wanted to get home, and was hoping to avoid an impound fee for his car." *Id.* at 31a.

Reynolds then decided to initiate a high-speed pursuit of Harris. Pet. App. 2a. Reynolds activated his lights, siren, and video camera. *Id.* at 31a. Harris continued driving away, in the direction of the county line and Peachtree City. *Id.* at 3a. He passed vehicles by crossing the double yellow center line and ran one red light. *Id.* at 31a. Harris, however, maintained control of his vehicle and used turn signals

when passing or turning, and no cars were entering the red-light intersection he crossed. *Id.* During the chase, Harris and the officers pursuing him drove at speeds between 70 and 90 miles per hour. *Id.* at 2a.

Reynolds then radioed dispatch to report the pursuit. *Id.* at 31a. Petitioner Timothy Scott, another Coweta County sheriff's deputy, heard Reynolds' announcement and unilaterally decided to abandon his undercover drug assignment and join in the pursuit. Pet. App. 3a, 31a-32a; R.48, at 114-18; *see also* R.36, Ex. A at 22:47:22 ("Let me have him . . . .").

Harris entered Peachtree City, where he slowed down and turned into a parking lot to get to another highway, Highway 74. Pet. App. 3a. Reynolds followed Harris, while Scott positioned himself on the other side of the parking lot to block Harris's exit. *Id.* at 3a, 32a. As Harris approached the exit, Scott drove his squad car directly into Harris's path. *Id.* at 3a.[2] Harris swerved to avoid him but could not, and Scott's car struck Harris's. Pet. App. 3a. The collision did not terminate the pursuit, however; Harris was able to exit the parking lot and enter the highway, with Scott following him closely. *Id.* at 32a. At that point, Peachtree City police department officers began blocking intersections along Highway 74 from cross-traffic. *Id.*

Once Harris and Scott were on Highway 74, Scott radioed his supervisor and asked for authorization to perform a "Precision Intervention Technique" ("PIT") maneuver. Pet. App. 3a. A PIT maneuver is a specialized technique where an officer driving at a safe speed (generally under 35 miles per hour) hits a suspect's car at a particular point in order to

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[2] Scott claims that Harris intentionally hit *his* car, Pet. App. 32a & n.2; *see also* J.A. 21-23, but this factual dispute must be resolved in Harris's favor on summary judgment. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 733 n.1 (2002).

spin and stop the car. *Id.*; *see* National Police Accountability Project ("NPAP") Br. 11-13. A PIT maneuver, if done correctly and under safe conditions, can stop a fleeing motorist quickly and safely, without putting either the suspect or the general public at risk. Pet. App. 3a. Because a PIT maneuver can cause significant injury if done incorrectly, national law enforcement standards generally require that an officer be specifically trained in the maneuver before performing it. *Id.* Scott, however, had never been trained in how to perform a PIT maneuver; he only knew about it from informal conversations around the police station. *Id.* at 3a-4a, 35a; R.49, at 137-41.[3] Nonetheless, Scott's supervisor authorized him to perform the maneuver, saying "Go ahead and take him out. Take him out." Pet. App. 32a-33a.

Scott was still following Harris on the highway, and there were no other motorists or pedestrians in the area. Pet. App. 32a-33a. Even without training in the PIT maneuver, Scott recognized that he could not perform the maneuver because he was going too fast – between 70 and 90 miles per hour. Knowing the PIT maneuver was too dangerous to perform at that speed, Scott chose an unlikely alternative: he simply sped up and "rammed his cruiser directly into" the back of Harris's car. *Id.* at 4a; *see also* at 33a.[4] Harris immediately lost all control of his vehicle, which ran down an embankment, flipped and crashed into a telephone pole, rendering Harris a quadriplegic. Pet. App. 4a.

2. Harris sued Scott and others pursuant to 42 U.S.C. § 1983, primarily alleging that Scott's decision to slam his car into the rear of Harris's car when the two were traveling

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[3] Indeed, no one in the Cowata County Sheriff's Department had been trained in this maneuver. R.54, at 49-50.

[4] As the district court noted, "The parties dispute whether Scott slowed down or sped up." Pet. App. 33a. Harris has alleged that petitioner "sped up slightly," J.A. 29, and that fact must be taken as true on summary judgment.

at high speeds was an unreasonable use of deadly force under the circumstances and thus a violation of his Fourth and Fourteenth Amendment rights. Pet. App. 35a. Scott moved for summary judgment, claiming qualified immunity. *Id.* at 30a, 40a. The district court denied that motion, applying the two-part test for qualified immunity: (1) whether the officer's actions violated the Constitution, and if so, (2) whether the constitutional rule violated by the officer was clearly established at the time the officer acted. *Id.* at 42a.

The district court first determined that Scott's actions violated Harris's constitutional rights. Pet. App. 37a-40a. Scott clearly had "seized" Harris when he "rammed Harris's vehicle for the purpose of stopping it," the court held, *id.* at 37a, and that seizure was objectively unreasonable under the totality of the circumstances, *id.* at 38a. To assess the reasonableness of the seizure, the court applied the factors identified in *Graham v. Connor*, 490 U.S. 386 (1989): the severity of the underlying crime at issue; whether Harris posed an immediate threat to Scott or others; and whether Harris was attempting to evade arrest by flight. Pet. App. 38a.

The district court first noted that "prior to Reynolds' decision to instigate a high-speed chase, Harris's only crime was driving 73 miles per hour in a 55 miles-per-hour zone"; he had not "menaced" and was not "likely to menace others." Pet. App. 38a. Further, once the chase began, Harris "maintained control over his vehicle, used his turn signals, and did not endanger any particular motorist on the road." *Id.* at 39a. Although Scott claimed that the collision in the parking lot demonstrated Harris's dangerousness, "[a]ccording to the [police department's] official report . . . *Scott* rammed *Harris's* car." *Id.* (emphasis added). Further, when Scott decided to ram Harris's car to stop the chase, "there were no other motorists or pedestrians nearby, thus casting doubt" on Scott's claim that Harris "posed an immediate threat of harm to others." *Id.* Finally, the police had Harris's license plate

number, name, and home address and could have apprehended him "at a later time." *Id.* at 39a-40a. In light of all of those circumstances, the district court concluded that "Scott's use of force – ramming the car while traveling at high speeds – was not in proportion to the risk that Harris posed." *Id.* at 40a.

The district court then turned to the question whether it was "clearly established" at the time that Scott's conduct was unreasonable. Pet. App. 40a. Although it was indeed clear "the level of force appropriate in a situation depended, at least in part, on the crime the fleeing suspect was thought to have committed," *id.* at 41a (citing *Graham* and *Tennessee v. Garner*, 471 U.S. 1 (1985)), Scott had not even bothered to find out that the underlying offense was speeding, *id.* Further, although Scott "rel[ied] heavily on the crash in the parking lot to show Harris was dangerous," "a large part of the responsibility for the parking lot incident rests with Scott[,] who deliberately drove into Harris's line of traffic." *Id.* The district court thus concluded that if a jury accepted Harris's view of the facts, Scott had been given fair warning that his conduct was illegal. To the extent that a jury might disagree with Harris and accept Scott's characterization of the day's events, those factual disputes "require[d] submission to a jury" and made summary judgment inappropriate. *Id.* at 41a-42a.

3. The court of appeals affirmed the denial of qualified immunity. Pet. App. 1a-29a.

Turning first to whether the facts alleged by Harris demonstrate a violation of the Constitution, the court of appeals asked whether "the force used by Scott to effectuate the seizure was reasonable." Pet. App. 7a-8a. The court determined that the force administered by Scott was "deadly force," relying on case law holding that vehicles can be dangerous weapons, the Model Penal Code and Coweta County Sheriff Department's definitions of deadly force, and the

agreement of every officer in this case that Scott employed deadly force when he rammed Harris's car. *Id.* at 9a-10a & 24a n.8. The court noted that deadly force is appropriate only in "limited circumstances," namely, where: (1) "'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others'" or "'threatens the officer with a weapon'" or "'there is probable cause to believe that he had committed a crime involving the infliction or threatened infliction of serious physical harm'"; (2) "if deadly force 'is necessary to prevent escape,'" and (3) "'if, where feasible, some warning has been given.'" App. 9a (quoting *Garner*, 471 U.S. at 11-12).

Here, "[n]one of the antecedent conditions for the use of deadly force existed." Pet. App. 11a. The pursuit began when Harris was observed speeding; there were "no warrants out for his arrest"; Harris posed "little, if any, actual threat to pedestrians or other motorists"; "there is no question that there were alternatives for a later arrest"; and "absolutely no warning was given." *Id.* at 11a, 25a n.10. As a result, the court of appeals concluded, the facts viewed favorably to Harris establish a violation of his Fourth Amendment right to be free from an unreasonable seizure. *Id.* at 12a-13a.

The court of appeals then considered whether the law at the time of the incident was sufficiently clear to give Scott "'fair notice'" that his actions were unlawful. Pet. App. 15a (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). Case law made clear that "an automobile, like a gun, could be used as a deadly instrument." Pet. App. 15a-16a (citing cases). And since *Garner*, the court stated, "officers have been on notice that they may not use deadly force to seize a fleeing suspect unless the suspect poses a significant threat of death or serious physical injury" and the other *Garner* preconditions are met. *Id.* at 15a, 17a-18a. Because those preconditions were not met in this case, the court held, a rea-

sonable officer would have had fair warning that the Fourth Amendment was violated. *Id.* at 20a.

In so holding, the court distinguished *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam), which reversed a denial of qualified immunity, finding the facts of that case to be entirely inapposite: there, the suspect was "a suspected felon with a no-bail warrant out for his arrest," who "had a violent physical encounter prior to the shooting"; the police officer "had arguable probable cause to believe that the suspect posed an imminent threat of serious physical harm to several officers and citizens" because it looked like the suspect was grabbing a gun; and the police officer warned the suspect before shooting. Pet. App. 18a.

SUMMARY OF ARGUMENT

I. Scott violated the Fourth Amendment when he intentionally slammed into Harris's vehicle with his police cruiser at a high speed in order to apprehend him for speeding.

The reasonableness of an officer's use of deadly force to apprehend a suspect is assessed under the clear standards set forth in *Tennessee v. Garner*, 471 U.S. 1 (1985): whether the suspect has threatened the officer or is suspected of a violent crime; the infliction of force likely to kill is the only means of preventing escape; and the suspect is given a warning where feasible. The Solicitor General suggests that these standards do no apply here because Scott's violent, high-speed, intentional collision with Harris's car was not likely to cause serious injury or death. The suggestion is frivolous, as anybody who has ever driven a car on a highway knows. Indeed, every officer in this case agreed that Scott's conduct was an act of deadly force, and an overwhelming amount of legal authority – cases, statutes, and police department policies – confirms the point. The Solicitor General's related suggestion that *Garner* applies only to the use of guns is likewise indefensible.

Judging Scott's conduct under the standards set forth in *Garner*, it is clearly unreasonable. Harris posed no imminent risk of harm to Scott or others; Harris was being chased for a traffic offense; Harris plainly could have been apprehended later; and Scott made no attempt to warn Harris before running him off the road at 80 miles per hour.

II. At the time of the events in this case, it was clearly established that Scott's conduct violated Harris's Fourth Amendment rights. At the time Scott acted, a reasonable officer in his position plainly would have known that ramming Harris's car was an unreasonable use of deadly force. *Graham* and *Garner* had established specific standards for the deployment of deadly force, and those standards applied with "obvious clarity" to the facts of this case. *United States v. Lanier*, 520 U.S. 259, 270-71 (1997).

Further, although there need not be a case with "materially similar" facts to give notice to an officer that his conduct was illegal, *Hope*, 536 U.S. at 741, numerous cases confirmed the application of *Garner* and *Graham* to this type of situation. And the undisputed fact that the policies of almost every American law enforcement agency, state and federal, prohibit the use of deadly force in these circumstances confirms beyond any doubt that Scott should have known that using deadly force against Harris was unreasonable.

ARGUMENT

Harris's qualified immunity claim is analyzed under the familiar two-step inquiry set out in *Saucier v. Katz*, 533 U.S. 194 (2001). First, this Court considers whether "the facts alleged show the officer's conduct violated a constitutional right." *Id.* at 201. Second, if the facts alleged demonstrate a constitutional violation, the Court considers whether the right at issue was "clearly established," that is, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 201-02.

Conduct may be clearly unlawful "even in novel factual circumstances" when "'a general constitutional rule already identified in the decisional law'" applies "'with obvious clarity'" to the conduct at issue. *Hope*, 536 U.S. at 741 (quoting *Lanier*, 520 U.S. at 270-71).

In this case, Scott's ramming of Harris's vehicle – an application of deadly force – was an objectively unreasonable seizure that violates the Fourth Amendment. Further, the law was sufficiently clear at the time of the incident to put a police officer on notice that conduct like Scott's was unreasonable and therefore unlawful.

I. SCOTT'S USE OF DEADLY FORCE TO STOP HARRIS'S FLIGHT WAS UNREASONABLE AND THUS VIOLATED THE FOURTH AMENDMENT

A. The *Garner* Standards Prohibit The Use Of Deadly Force Unless Three Clear Conditions Are Satisfied

A claim that a police officer used excessive force during a seizure is a Fourth Amendment claim, judged under the "objective reasonableness" standard that balances "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks omitted). The "'reasonableness' of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out." *Id.* at 395-96. If, considering the "totality of the circumstances," the use of force is unreasonable, then the Fourth Amendment has been violated. *Garner*, 471 U.S. at 9.

Although the right to make a stop or arrest "necessarily carries with it the right to use some degree of physical coercion," different levels of force are appropriate in different factual circumstances. *Graham*, 490 U.S. at 396. The appropriate level of force depends on "the severity of the crime

at issue"; "whether the suspect poses an immediate threat to the safety of the officers or others"; and "whether he is *actively* resisting arrest," as opposed to "attempting to evade arrest by flight." *Id.* at 396 (emphasis added). Courts reviewing the use of force assess these factors "from the perspective of a reasonable officer on the scene" who may be "forced to make [a] split-second judgment[] . . . about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court applied the Fourth Amendment's general reasonableness standard to a particular type of force – deadly force, the most extreme force possible. As the *Garner* Court explained, the constitutionality of an application of deadly force, like any claim of excessive force during a seizure, is evaluated under the Fourth Amendment's balancing test for reasonableness. *Id.* at 7-9.

In determining when the use of deadly force is reasonable, the Court specifically relied upon the policies already adopted by police departments. It emphasized that "a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects." 471 U.S. at 10-11. Accordingly, the Court firmly rejected the suggestion that the use of deadly force to apprehend any felony suspect is per se reasonable. *Id.* Deadly force is reasonable if, but only if, the suspect is demonstrably dangerous, i.e., "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm." *Id.* at 11-12. Even then, two other conditions must be satisfied: deadly force is "necessary to prevent escape," and "where feasible, some warning has been given." *Id.*

B. The *Garner* Standards Govern This Case

We explain below why, when applied to this case, the *Garner* standards unambiguously precluded the use of

deadly force under the circumstances faced by deputy Scott. *See infra* Part I.C.[5] We first respond, however, to the Solicitor General's extraordinary suggestion that the *Garner* standards do not apply here at all. *Garner* does not apply, the Solicitor General suggests, because (a) this case does not involve "deadly force," and (b) even if it did, *Garner* is limited only to deadly force cases involving the shooting of a suspect with a gun. These arguments are both wrong and irrelevant.

1. The suggestion that this case does not involve deadly force (Pet'r Br. 14; U.S. Br. 15-16) is, in a word, frivolous. Scott was traveling at a speed between 70 and 90 miles per hour when he sped up and slammed directly into back of Harris's vehicle with his police cruiser. *See* Pet. App. 3a-4a; R.36, Ex. A at 22:48:02 ("We're running about 90 now. . ."). That act constitutes deadly force under every definition and conception known to American law.

The Model Penal Code defines "deadly force" as "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury." Model Penal Code § 3.11(2) (2001); *see Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985) (essentially adopting that definition). There is widespread agreement on this definition in the law enforcement community. *See, e.g.*, R.48, Ex. 12, at 82 (Coweta County Sheriff Department defines "deadly force" as "force which, under the circumstances in which it is used, is readily capable of causing death or serious bodily injury"); U.S. Br.

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[5] As an preliminary matter, there can be no doubt that Harris was "seized" within the meaning of the Fourth Amendment when Scott used his police cruiser to hit Harris's car. "Whenever an officer restrains the freedom of a person to walk away, he has seized that person." *Garner*, 471 U.S. at 7; *see also Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (noting that a police officer's hitting a fleeing car and causing it to crash is a seizure).

15 n.4 (United States Department of Justice policy defines "deadly force" as "any force that is likely to cause death or serious physical injury"). Anyone who has ever driven a car at 80 miles an hour knows that slamming into another car traveling at that speed is likely to cause death or serious injury.

Indeed, it is for precisely that reason that so many states have treated the intentional or reckless use of cars to cause injury as the unlawful use of deadly instruments. Several state statutes criminalizing aggravated assault and battery note that a vehicle may be a "dangerous instrument," which is an instrument generally capable of causing death or serious bodily injury.[6] At least one state's criminal code explicitly includes motorized vehicles in its definition of "deadly weapon."[7] Similarly, the myriad state laws criminalizing the

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[6] *See, e.g.*, Ala. Code § 13A-1-2(5) (2006) (a "[d]angerous [i]nstrument" is "[a]ny instrument . . . which . . . is highly capable of causing death or serious physical injury," including a "vehicle"); Conn. Gen. Stat. Ann. § 53a-3 (West 2006) ("'Dangerous Instrument' means any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury, and includes a 'vehicle' . . ."); N.Y. Penal Law § 10.00 (McKinney 2006) ("'Dangerous instrument' means any instrument, article or substance, including a 'vehicle' as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury.").

[7] *See* Wyo. Stat. Ann. § 6-1-104 (2006) ("'Deadly weapon' means but is not limited to a firearm, explosive or incendiary material, motorized vehicle, an animal or other device, instrument, material or substance which in the manner it is used or is intended to be used is reasonably capable of producing death or serious bodily injury."); *see also* Wis. Stat. Ann. § 968.20 (West 2006) (statute governing return of seized property assumes that a "motorized vehicle" may be a "dangerous weapon"). Further, other state statutes, such as those addressing the consequences of criminal convictions on driver's licensing, recognize that a person may commit a crime by using a vehicle as a deadly weapon. *See, e.g.*, Cal. Vehicle Code § 13351.5 (West 2006) (revocation upon felony conviction

effects of dangerous driving – such as vehicular homicide statutes[8] and vehicular assault statutes[9] – demonstrate that a car may be used on the roads as a deadly instrument.

State case law similarly abounds with judicial determinations not only that vehicles have the *potential* to be used as deadly weapons, but that they *have* been used as deadly weapons in circumstances similar to Scott's ramming of Harris's car in this case. For example, courts have found that a defendant was using deadly force when driving recklessly or dangerously[10]; when using his vehicle offensively towards a victim or a police officer[11]; and when – most pertinent here – intentionally crashing into another vehicle.[12]

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in which court finds that vehicle was used as deadly weapon); Or. Rev. Stat. Ann. § 809.235 (West 2005) (revocation upon conviction for murder or manslaughter where court finds that a motor vehicle was intentionally used as a dangerous weapon).

[8] *See, e.g.*, Colo. Rev. Stat. § 18-3-106 (2006); S.D. Codified Laws § 22-16-41 (2006); Wash. Rev. Code Ann. § 46.61.520 (West 2006).

[9] *See, e.g.*, Colo. Rev. Stat. § 18-3-205 (2006); Del. Code Ann. tit. 11, §§ 628-29 (2006); Mont. Code Ann. § 45-5-205 (2006); N.H. Rev. Stat. Ann. § 265:79 (2006); N.Y. Penal Law § 15.05, subd. 4, 120.03 (McKinney 2006); Ohio Rev. Code Ann. § 2903.08 (West 2006); Tenn. Code Ann. § 39-13-106 (West 2006); Wash. Rev. Code Ann. § 46.61.522 (West 2006).

[10] *State v. Jones*, 538 S.E.2d 917, 922 (N.C. 2000) (upholding assault conviction and finding it "well settled in North Carolina that an automobile can be a deadly weapon if it is driven in a reckless or dangerous manner").

[11] *See, e.g.*, *Adams v. State*, 634 S.E.2d 868, 870 (Ga. Ct. App. 2006) (driver speeding at 90 miles per hour toward police officers); *State v. Batchelor*, 606 S.E.2d 422, 424 (N.C. Ct. App. 2005) (an automobile driven at high speed is a deadly weapon as a matter of law); *Sheffield v. State*, 607 S.E.2d 205, 206 (Ga. Ct. App. 2004) (speeding driver using car offensively against police officer during high-speed chase guilty of aggravated assault on a police officer); *Urbigkit v. State*, 67 P.3d 1207, 1225 (Wyo. 2003) (car driven at drug task force agents was a deadly weapon); *Dyer v. State*, 585 S.E.2d 81, 82-83 (Ga. Ct. App. 2003)

Unsurprisingly, numerous federal precedents have noted that a police officer who uses his or her squad car to apprehend a suspect is using deadly force. *See, e.g., Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995) ("an attempt to hit an individual with a moving squad car is an attempt to apprehend by use of deadly force"); *Donovan v. City of Milwaukee*, 17 F.3d 944, 949-50 (7th Cir. 1994) (assuming striking fleeing motorcycle with police car was deadly force); *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988) ("[M]any law enforcement tools possess the potential for being deadly force, including . . . a police officer's vehicle.").

Similarly, numerous police department policies explicitly define deadly force to include use of a police vehicle to stop a suspect. *See, e.g.*, R.45, Alpert Aff. at 8-9 (California Commission on Peace Officer Standards defines "deadly force" to include forcible stopping with a vehicle and equates it with "the use of firearms"); Minneapolis, Minn., Police Dep't Manual § 7-407.03, *available at* http://www.ci.minneapolis.mn.us/mpdpolicy/7-400/7-400.asp ("Vehicle contact . . . may only be used when state law permits use of

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(swerving vehicle "at pursuing officers in an offensive manner" was aggravated assault); *People v. Claborn*, 36 Cal. Rptr. 132, 133 (Cal. Ct. App. 1964) (aiming at and hitting victim's vehicle head-on was assault with a deadly weapon).

[12] *See, e.g., Clark v. State*, 746 So. 2d 1237, 1239 (Fla. Dist. Ct. App. 1999) (aggravated battery conviction when defendant rammed another vehicle with his truck twice); *Taylor v. State*, 881 P.2d 755 (Okla. Crim. App. 1994) (defendant used car as "dangerous weapon" when he rammed wife's vehicle 20 times without regard to safety of wife or children); *Blalock v. State*, 299 S.E.2d 753, 754 (Ga. Ct. App. 1983) (aggravated assault conviction when defendant rammed the side of another vehicle while traveling at 25 mph); *People v. Blacksmith*, 238 N.W.2d 810, 813 (Mich. Ct. App. 1975) (swerving at officer during high-speed chase was felonious assault); *see also United States v. Aceves-Rosales*, 832 F.2d 1155, 1157 (9th Cir. 1987) (per curiam) ("It is indisputable that an automobile can inflict deadly force on a person and that it can be used as a deadly weapon.").

deadly force."); Portland, Ore., Police Dep't Policy & Procedure § 630.05 (Pursuit Intervention Strategies), *available at* http://www.pursuitwatch.org/pursuit_policies/Portland_Oregon.pdf ("Ramming is considered deadly physical force. . . ."); *see also* NPAP Br. 15-17.

Perhaps most decisively, all of the police officers involved in this case agreed that Scott's ramming of Harris's vehicle with his police cruiser was "deadly force." *See* Pet. App. 24a n.8. Scott himself agreed that his action constituted the use of deadly force. R.48, at 18-22, 157-58. Scott's supervisor understood his authorization to "[g]o ahead and take him out" as an authorization for the use of deadly force. R.50, at 54-55, 62-63. Deputy Reynolds, who initiated the pursuit, likewise knew that Scott used deadly force. *See* R.49, at 118-19. And both sides' experts below described the action as deadly force. *See* R.45, Alpert Aff. at 11 (Harris's expert); R.57, at 171-72 (Scott's expert).[13]

Against all of this, the Solicitor General offers the meaningless observation that "the use of a vehicle to stop a fleeing suspect may not amount to deadly force in any number of circumstances." U.S. Br. 16; *see also* Pet'r Br. 14. Of course not. Police cruisers are often used to set up visible roadblocks, or to cut off an exit from a road or parking lot. Many low-speed interventions do not risk incredibly violent accidents. The question here is not whether *every* use of a police vehicle to stop a suspect presents a substantial risk of serious injury or death. It is whether *this* use of a vehicle risked se-

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[13] Notably, even the Solicitor General and Scott acknowledge – albeit unwittingly – that Scott applied deadly force to Harris. Both contend that Harris, in fleeing at high speeds, posed a potentially deadly threat to other motorists on the road. U.S. Br. 16 ("A vehicle poses a potentially deadly risk to others, and a suspect operating a vehicle in a reckless fashion is thus *always* dangerous."); Pet'r Br. 10 ("an automobile is a dangerous instrumentality" (internal quotation marks omitted)).

rious injury or death. On that question, it is not even a close call.

2. The Solicitor General also suggests that *Garner* should not apply here because *Garner* governs *only* police shootings, which are the most likely to cause serious injury or death. U.S. Br. 15. This argument, too, is frivolous. There is not a word in *Garner* that limits its analysis exclusively to the use of guns. To the contrary, *Garner* explicitly discusses the use of deadly force through means other than guns, such as through "a hand-to-hand struggle." 471 U.S. at 11-12, 14.

Nor is there any logic to the Solicitor General's suggestion that guns are subject to unique constitutional analysis because they are more likely than other means of restraint to cause serious injury or death. Many methods of force can be applied to create a risk of serious injury or death – certainly an 80-mile-an-hour vehicular collision on a narrow highway is at least as likely to result in injury or death as a gunshot somewhere in the direction of a fleeing suspect. What *Garner* recognizes is that police officers sometimes must apply force that is deadly *because it is deadly* – the suspect *must be stopped* despite the predictable consequences. The use of such force may be permissible, even desirable, when it is *actually necessary* – but when it is not, the fact that the suspect lies dead from a gunshot wound, or suffocating chokehold, or a violent vehicular collision, is constitutionally irrelevant. Because all different types of deadly force pose essentially the same risks, there is no basis for applying different constitutional standards to assess the reasonableness of each of them. The same standards must and do govern the officer's choice to restrain by any means objectively likely to kill.

3. Finally, the question whether "*Garner* applies" or "*Graham* applies" is in any event a red herring – the two tests are substantively identical. *Garner* is merely an application of the test generalized in *Graham*, as the latter case

makes clear. Not only does *Graham* cite *Garner* with approval as an example of the proper "analy[sis] under a Fourth Amendment standard," 490 U.S. at 394-95, *Graham* specifically relies on *Garner* to define the factors relevant to claims of excessive force during seizures generally, *id.* at 396. Because the two cases use essentially the same factors in assessing reasonableness, *compare Graham*, 490 U.S. at 396, *with Garner*, 471 U.S. at 11-12, the outcome under either case is the same.

C. Scott's Use Of Deadly Force Was Unambiguously Unreasonable Under The *Garner* Standards

As noted above, deadly force is permissible under *Garner* only when three conditions are met: (1) the suspect has threatened the officer with a weapon, or there is probable cause to believe he has committed a crime involving serious physical harm; (2) only the use of deadly force will prevent escape, and (3) a warning is given where feasible. *Garner*, 471 U.S. at 11-12. When the disputed facts are viewed in the light most favorable to Harris, *see Saucier*, 533 U.S. at 201, none of the *Garner* factors was present when Scott decided to speed up and slam into Harris's vehicle at 80 miles per hour on a narrow highway.

1. The first factor involves the nature of the risk the suspect poses. A direct threat to an officer indicates an obvious risk, 471 U.S. at 11, but Harris made no such threat here.[14]

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[14] The Solicitor General suggests that Harris had threatened Scott because he "struck petitioner's vehicle" in the shopping mall parking lot during the chase. U.S. Br. 13, 18. The Solicitor General has the facts backwards: on the record that controls here, Scott struck Harris in an attempt to stop him, not the other way around. Pet. App. 39a; *see also* R.46, Ex. 1 (police report) ("one Coweta County unit ram[med] the Cadillac"). This case is thus unlike cases involving the use of deadly force against fleeing suspects who *did* use their cars to pose direct physical threats to officers. *See, e.g., Scott v. Clay County*, 205 F.3d 867, 872, 876-78 (6th Cir. 2000) (car accelerating into officer's path).

Absent such a threat, this factor turns critically on the offense the suspect is believed to have committed. *Garner* recognizes the common-sense proposition that a suspect who has committed a violent crime is more likely to pose a danger to police officers and others during flight than a person suspected of committing a minor offense. *Id.* at 11-12. And it is more important to apprehend a person who is suspected of committing a serious crime because he is more dangerous to the public if he escapes. *See id.* As Scott himself notes, "police generally have the option of calling off the pursuit" to "lessen the risk[s]" posed to police officers and others, Pet'r Br. 11, which is a crucial alternative when the suspect's crime is minor. Indeed, many state and local police policies specifically prohibit the use of deadly force when the underlying crime is minor, reflecting law enforcement's agreement that it is "not better that all felony suspects die than that they escape." *Garner*, 471 U.S. at 11; *see id.* at 19-20 (citing law enforcement policies prohibiting use of deadly force to demonstrate unreasonableness of use).[15]

This crucial factor clearly did not justify Scott's use of deadly force to stop Harris's controlled vehicular flight from a speeding ticket. Harris had not threatened Scott with a weapon, nor had he committed a crime involving serious physical harm, nor was he likely to commit one. Pet. App. 2a; *see also* R.49, at 77 (Reynolds admits that if Harris had slowed down, he would not have even initiated a traffic

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[15] *See, e.g.*, Ga. Code Ann. § 17-4-20(b) (West 2006) (deadly force allowed "when there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm"); U.S. Br. 15 n.4 (Department of Justice policy only allows use of deadly force to prevent a suspect's escape when "the suspect has committed a felony involving the infliction or threatened infliction of serious physical injury or death" and "the escape of the subject would pose an imminent danger of death or serious physical injury"); Pet. App. 34a (Coweta County Sheriff's Office policy requires officers to "weigh[] the pertinent factors," including "the gravity of the offense").

stop); Pet App. 38a (Harris had not "menaced" and was not "likely to menace others"). There were no warrants out for his arrest. He was a kid who had been speeding, trying to evade arrest because he was scared and wanted to get home without paying an impound fee. *See* Pet. App. 31a. He exceeded the speed limit and passed other cars against the yellow line, to be sure, but few drivers are innocent of those offenses – and police officers generally do not regard such traffic violations as so dangerous as to warrant violent, deadly police action in response. Yet Scott, for his part, knew only that Harris was being pursued and refused to stop – Scott did not even attempt to discover *why* Harris was being pursued before deciding to ram his car. R.48, at 116-17. A reasonable officer, by contrast, would have understood that nothing Harris had done justified Scott's decision to "take him out."

The Solicitor General suggests that the severity of the underlying offense is of little import because "[r]egardless of why a driver chooses to flee the police . . . he constitutes the same threat to the public behind the wheel." U.S. Br. 7; *see also id.* at 16, 19. As an initial matter, it simply is not true that every suspect fleeing the police in a car poses the same risk. There is an obvious difference between a suspect who maintains control of his vehicle and avoids other cars and pedestrians (like Harris did here) and a suspect who aggressively drives his vehicle directly at police officers and pedestrians. More fundamentally, the underlying offense matters because, for example, a person who has committed a violent felony is more likely to use more extreme and dangerous measures to avoid capture and the greater punishment associated with a violent felony.

Finally, Harris's driving did not pose an immediate risk of serious bodily injury or death to others. During the chase, Harris "remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns." Pet. App. 12a. Once he left the shopping mall parking lot,

the police began blockading roads. As a result, there were very few other cars in the area. Indeed, Scott himself admitted that there were "no motorists in the area" when he struck Harris. J.A. 8-9; *see id.* at 29-30. Although Harris may not have known the roads were blocked off, U.S. Br. 17-18, Scott *did* know that, and a reasonable officer should have realized that the blockades meant that Harris's controlled flight posed little risk to the general public. Further, the fact that Harris did not threaten any pedestrians or run other motorists off the road distinguishes this case from others holding that deadly force was justified. *See, e.g.*, *Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002). The Solicitor General suggests that deadly force was warranted because Harris could have "los[t] control at any moment," U.S. Br. 17, but that possibility does not rise to the level of the "*immediate* threat" required for the use of deadly force, *Garner*, 471 U.S. at 11 (emphasis added), particularly where the suspect's death or serious bodily injury was certain to result.

2. The second *Garner* factor is whether killing the suspect is the only reasonable means of preventing his escape. Not every suspect of a crime should be pursued at high speed, especially when the suspect could be apprehended later by other means. *Garner*, 471 U.S. at 9 n.8 ("the failure to apprehend at the scene does not necessarily mean that the suspect will never be caught"). This is a factor police departments train their officers to consider before using deadly force. *See, e.g.*, Pet. App. 34a (Coweta County Sheriff's Office policy advises an officer to discontinue pursuit "'upon receipt of additional information . . . that would allow later apprehension and successful prosecution'"); Portland, Ore., Policy & Procedure, § 630.05 (Prohibited Pursuits), *available at* http://www.pursuitwatch.org/pursuit_policies/Portland_Oregon.pdf (no pursuit allowed of "persons whose identities are known, who can be apprehended at a future time").

In this case there is absolutely "no question that there were alternatives for a later arrest" of Harris. Pet. App. 11a. Deputy Reynolds took down Harris's license plate number and was able to obtain his home address, *id.* at 2a, and Scott "personally observed Harris at very close range" during their altercation in the parking lot, Pet'r Br. 19. The police plainly could have gone to Harris's home once the situation had diffused and given him a speeding ticket. Instead, Reynolds chose to initiate a high-speed pursuit, and Scott chose to unilaterally join that pursuit after hearing it broadcast on the police radio. Scott's failure to even *consider* whether Harris could have been apprehended later was unreasonable.

The Solicitor General does not dispute that Harris easily could have been picked up later, with no risk to him, the officers, or the public. In tacit acknowledgment that this factor, if applied here, plainly would have precluded the use of deadly force, the Solicitor General argues that the factor should simply be ignored. According to the Solicitor General, it "creates a perverse and dangerous regime in which police officers are effectively required to let suspects fleeing by vehicle escape." U.S. Br. 21. Again, the Solicitor General attacks a straw man. Nobody contends that officers are "effectively required" to let all suspects escape. The premise of *Garner* is that *some* suspects – those who do not pose a serious risk of harm – must be allowed to escape, if the only alternative is to kill them instead. If the Solicitor General means to suggest that it is better that all misdemeanor suspects die than that they escape, the suggestion is indefensible, not to mention squarely contrary to *Garner*, *see* 471 U.S. at 11; *accord Waterman v. Batton*, 393 F.3d 471, 483 (4th Cir. 2005 (Motz, J., dissenting) ("No matter how exasperated an officer becomes, the Constitution does not permit him to shoot a motorist for speeding.").

3. Finally, *Garner* unambiguously precluded the use of force here because it holds that the use of deadly force is rea-

sonable *only* when the officer first gives a warning, if feasible – *even* as to homicidal felons when no other alternative is present. Harris, a scared teenager stupidly trying to speed home and away from the police, did not even get the benefit of a loudspeaker warning that if he did not pull over, he would be slammed off the narrow highway at high speed. Nobody here denies that it was feasible to warn Harris that deadly measures were imminent, nor does anybody contend that Harris would not have heeded such a stark warning. Instead, with no warning and no justification, Scott suddenly acted to "take him out."

Scott's decision to kill Harris rather than let him escape and be picked up at home minutes later was patently unreasonable under *Garner*'s clear standards.

D. Police Department Policies Nationwide Sharply Underscore The Unreasonableness of Scott's Action

Many police departments have specific policies establishing that ramming a suspect's car is an application of deadly force and is presumptively unreasonable. "If those charged with the enforcement of the criminal law have abjured" the practice, it makes little sense for the judiciary to pronounce the practice reasonable. *Garner*, 471 U.S. at 11; *see also id.* at 18 (relying on "the policies adopted by the police departments themselves" to establish unreasonableness).

Numerous police department policies outright prohibit vehicular contact with suspects or suspects' vehicles. For example, the International Association of Chiefs of Police Model Pursuit Policy states: "Officers may not intentionally use their vehicle to bump or ram the suspect's vehicle in order to force the vehicle to a stop off the road or in a ditch." R.45, Alpert Aff., at 8. Similarly, Virginia's model pursuit policy states that "[o]fficers shall not intentionally ram, bump, or collide with a fleeing vehicle . . ." Virginia Po-

lice/Sheriff's Department General Order No. 2-9, at 2-9.18 (July 1, 1999), *available at* http://pursuitwatch.org/pursuit_policies/Virginia_Model.pdf. Those law enforcement agencies that do not completely ban vehicular contact limit its uses to very narrow circumstances. *See, e.g.*, Utah Vehicle Pursuit Model Policy, Part V(A)(3)(c), *available at* http://www.urmma.org/model_policies/Vehicle_Pursuit/vehicle_pursuit.html ("ramming" is a "last resort measure," to be used only when "all reasonable alternative means of apprehension have been considered and rejected"); U.S. Br. 19 n.6 (National Park Service prohibits ramming unless all "other reasonable alternatives have been exhausted"); *see generally* NPAP Br. 13-20.

The fact that police departments and federal agency policies across the board prohibit or severely limit the practice of ramming a suspect's vehicle to apprehend him demonstrates just how far outside the mainstream of accepted law enforcement practices Scott was acting when he chose to slam Harris off the road at high speed.[16]

II. IT WAS CLEARLY ESTABLISHED THAT DEADLY FORCE WAS UNREASONABLE UNDER THE CIRCUMSTANCES HERE

A police officer whose conduct violates the Constitution is nevertheless entitled to qualified immunity unless the constitutional proscription is "clearly established." "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. A right may be

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[16] This case does not present an opportunity to assess the appropriateness of police officers performing a PIT maneuver, because it is undisputed that Scott did not perform a PIT maneuver in this case, and, indeed, could not have done so under the circumstances. *See, e.g.*, Pet. App. 4a; R.57, at 198, 201-02.

clearly established even if "the very action in question" has not "previously been held unlawful," so long as its unlawfulness is "apparent" in "light of pre-existing law." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Put another way, "general statements of the law are not inherently incapable of giving fair and clear warning," and sometimes "a general constitutional rule already identified in the decisional law may apply with obvious clarity" to the conduct at issue. *Lanier*, 520 U.S. at 271.

Even in contexts where the constitutional inquiry is often fact-dependent, a plaintiff need not point to precedent with facts "materially similar" to the conduct at issue to defeat qualified immunity. *Hope*, 536 U.S. at 741. "'There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.'" *Lanier*, 520 U.S. at 271 (quoting *United States v. Lanier*, 73 F.3d 1380, 1410 (6th Cir. 1996) (Daughtrey, J., dissenting)).

In determining whether an officer had "fair warning" that his actions were unconstitutional, Supreme Court precedent, court of appeals precedent, and law enforcement policies are all relevant. *Hope*, 536 U.S. at 741-45 (considering judicial precedent, as well as Department of Justice and state law enforcement policies).

In this case it was clearly established at the time of the high-speed chase that ramming without warning a person who was observed speeding, but who was not otherwise dangerous, and who could have been apprehended later violated the Fourth Amendment.

As a starting point, "there is no doubt that *Graham* . . . clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." *Saucier*, 533 U.S. at 201-02. And *Graham* and *Garner* together identify the fac-

tors an officer must consider before deciding what amount of force is appropriate, including specific conditions that must be met before a suspect can be killed to prevent escape. *See, e.g.*, *Whitfield v. Melendez-Rivera*, 431 F.3d 1, 8 (1st Cir. 2005) (finding that *Graham* and *Garner* provide the requisite fair warning to police officers).

These factors apply with "obvious clarity" to Scott's conduct in this case. *Lanier*, 520 U.S. at 270-71. Nobody suggests that Scott considered all of the relevant factors, found that different factors pointed in different directions, and then made a judgment call that deadly force was warranted. Instead, Scott readily admits that he *did not even consider* several of the conditions this Court identified as critical in deadly force cases: the seriousness of the underlying offense, whether later apprehension of the suspect was possible, and whether a warning could be given. As the court of appeals found, "*none* of the limited circumstances identified in *Garner* that might render this use of deadly force constitutional are present here." Pet. App. 11a; *see also supra* pp. 18-23.

The Solicitor General suggests that *Garner* does not apply with "obvious clarity" to Scott's conduct because of the Court's per curiam decision in *Brosseau v. Haugen*, 543 U.S. 194 (2004). *See* U.S. Br. 24-25. In the Solicitor General's view, because the Court found that the conduct at issue in *Brosseau* – which involved a police officer shooting a suspect fleeing in a vehicle – did not violate a clearly established right, Scott likewise could not have had sufficient notice that his conduct violated a clearly established right. *See id.* But just as this case is an easy case because none of the *Garner* factors is met, *Brosseau* was an easy case because they *all* were met. The suspect in *Brosseau* was a suspected felon with a no-bail warrant out for his arrest; he had been in a fight right before the police arrived; as he escaped through a residential neighborhood, he posed a threat to three police

officers on foot and three adults and a child in small cars; the police believed he had a weapon in his vehicle; the police officers used escalating levels of force before resorting to deadly force; and the police gave a warning before using deadly force. *See Brosseau*, 543 U.S. at 195-97; *see also* Pet. App. 18a-19a & 27a n.14. The Court's holding that the plaintiff did not have a clearly established right to be free from a police gunshot on those facts says nothing at all about the clarity with which *Garner* speaks to Harris's case. Indeed, the *Brosseau* Court specifically noted that the *Garner* standard can "clearly establish" whether the use of deadly force is unreasonable in an "obvious case," 543 U.S. at 199 – and this is an obvious case.

In addition to the specific guidance provided by *Garner*, court of appeals precedent and law enforcement policies clearly established Harris's right. First, there was ample judicial authority to support the common-sense proposition that a police officer's ramming of his vehicle into a suspect's vehicle is an application of deadly force. *See, e.g.*, *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988) ("many law enforcement tools possess the potential for being deadly force" including "a police officer's vehicle"); *Galas v. McKee*, 801 F.2d 200, 203 (6th Cir. 1986) ("high-speed pursuits are no different than the use of firearms to apprehend fleeing suspects"); *see also supra* pp. 14-15. Law enforcement agencies have likewise routinely recognized that "ramming" a suspect's vehicle is an application of deadly force. *See supra* pp. 15-16.

Further, it was well-established that using deadly force without a warning to apprehend a nonviolent suspect who could have been apprehended later is unconstitutional. *Garner* itself is amply clear, and, at the time of the incident here, there were numerous court of appeals precedents applying *Garner* to find that use of deadly force against a fleeing nonviolent suspect was unconstitutional. *See, e.g.*, *Acosta v.*

City & County of S.F., 83 F.3d 1143, 1146-47 (9th Cir. 1996) (no qualified immunity where police officer shot person suspected of purse snatching who posed no danger to police as he drove away); *Ludwig v. Anderson*, 54 F.3d 465, 467-69 (8th Cir. 1995) (qualified immunity inappropriate where "emotionally disturbed" person – who was not suspected of any crime – ran away from the police and police officers hit him with a police cruiser and shot him without first providing a warning).[17]

The Solicitor General argues that an Eleventh Circuit precedent, *Adams v. St. Lucie County Sheriff's Dep't*, 998 F.2d 923 (11th Cir. 1993) (en banc), *adopting dissenting opinion in* 962 F.2d 1563 (11th Cir. 1992), would have suggested to Scott at the time of the chase that his conduct was lawful. But *Adams* held only that ramming a suspect's car was not clearly a "seizure" in 1985, when the incident occurred; the court specifically held "we need not decide today whether the Fourth Amendment was violated." 962 F.2d at 1574-77. Subsequent to the incident in *Adams*, but long before the incident here, this Court made clear in *Brower v. County of Inyo*, 489 U.S. 593 (1989), that when a police officer hits a fleeing car and causes it to crash, there *has* been a "seizure" under the Fourth Amendment, *id.* at 597. *Adams* was thus irrelevant by the time Scott acted.[18]

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[17] And more recent precedent confirms the unlawfulness of Scott's actions. *See Vaughan v. Cox*, 343 F.3d 1323, 1326-27 (11th Cir. 2003) (Cox, J.) (no qualified immunity when police officer intentionally caused two suspects' truck to crash into his police car and shot the suspects during a high-speed chase); *see also, e.g., Sigley v. City of Parma Heights*, 437 F.3d 527, 533-37 (6th Cir. 2006) (no qualified immunity when officer shot suspect driving away from drug deal); *Smith v. Cupp*, 430 F.3d 766, 773-75 (6th Cir. 2005) (no qualified immunity when officer shot person suspected of making threatening phone calls who tried to escape in police car).

Not only did decisional law provide clear notice to Scott, but the policies of law enforcement agencies nationwide made equally clear that ramming Harris's vehicle was not a reasonable means of apprehending him. *See supra* pp. 23-24. Those policies provide powerful evidence that any reasonable police officer would have known that Scott's actions were out of line. *See Hope*, 536 U.S. at 741-42; *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

In sum, this is not a case exploring the "hazy border" between acceptable and excessive force. *Saucier*, 533 U.S. at 206 (internal quotation marks omitted). It is a case involving a police officer who failed even to consider the steps a reasonable officer would take before deciding whether to risk killing a misdemeanor, traffic-offense suspect, rather than let him speed away under control. Having failed to consider whether the very limited conditions justifying the use of deadly force were present, it should come as no surprise to

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[18] Further, the fact that a smattering of cases in the various federal courts of appeals have found qualified immunity appropriate in markedly different circumstances says little about the reasonableness of petitioner's conduct here. In all but one of the cases cited by Scott and the Solicitor General, the suspects posed a direct and immediate danger to police officers or others, clearly distinguishing them from Harris. *See, e.g., Scott v. Clay County*, 205 F.3d at 877 (suspect accelerated toward the police and drove a motorist off the road); *Cole v. Bone*, 993 F.2d 1328, 1331-34 (8th Cir. 1993) (driver of truck forced more than 100 cars off the road, endangered motorists, and attempted to ram several police cars; chase lasted 50 miles); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (suspect drove directly into officers on a residential dead-end street); *Weaver v. State*, 73 Cal. Rptr. 2d 571, 574-76 (1998) (pursuit became dangerous because it "had lasted over an hour and had covered several freeways"). The remaining case, *Donovan v. City of Milwaukee*, 17 F.3d 944 (7th Cir. 1994), like *Adams*, is inapposite because the court of appeals based qualified immunity on a split in the federal circuits at the time of the incident "about whether the intentional use of a deadman roadblock" was a seizure, *id.* at 953, a conflict that was subsequently resolved in *Brower*.

Scott that they were not. His conduct was patently unlawful, as he had every reason to know.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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